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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 218.

The People of the State of New York, *ex rel.*
C. HANDASYDE WHITNEY,

Appellant,

against

MARK GRAVES, JOHN P. HENNESSEY and JOHN J. MERRILL, as Tax Commissioners of the State of New York,

Appellees.

APPEAL FROM THE SUPREME COURT, COUNTY OF ALBANY, STATE OF NEW YORK.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Opinions Below.

As stated in appellant's brief, no opinions were filed in the courts below and appellant has correctly set forth the reported decisions.

Jurisdiction.

Appellees filed a motion to dismiss or affirm pursuant to Rule 12, paragraph 3, and, by an order entered by this Court on October 12, 1936, consideration thereof and of the question of jurisdiction was postponed to the hearing of the case on the merits.

Statement of the Case.

The facts, as set forth in the "Statement of Facts" in appellant's brief, are generally correct and, with one exception and some addition, we adopt the same to avoid burdening the Court with reiteration.

The exception referred to relates to the statement (Appellant's Brief p. 6) that the Stock Exchange member firms having business offices in New York, who executed orders on the Exchange for appellant's firm, did so "in their own names as principals * * *."

On the contrary, it clearly appears that appellant's firm dealt with its three New York correspondents (R. 49) pursuant to the terms of a written contract (Exhibit A, R. 69-72), the particular contract offered in evidence being typical of all three (R. 50). By the terms of such contract, the New York member firm was specifically constituted the agent of appellant's firm for the purpose of consummating purchases and sales on the New York Stock Exchange (R. 63, 69, 71).

In addition, it is undisputed that a membership in the New York Stock Exchange carries with it valuable privileges and has a market value for the purpose of sale; that the New York Stock Exchange is an unincorporated, voluntary association, limited as to membership, governed by its own constitution, by-laws and rules; that such association holds the beneficial ownership of the entire capital stock of a New York corporation which owns the building in which the business of the Exchange is transacted, with the land upon which it stands and which is situated in the City and State of

New York; that a member may personally buy or sell only in the Exchange building; that a member of the Exchange may buy or sell for the account of other members at a commission substantially less than that charged to a non-member; that such rights and privileges are valuable and are exercisable only in transactions conducted at the New York Stock Exchange building in the City and State of New York (R. 45).

In 1929, appellant was required to make a contribution to the Exchange for capital purposes (R. 53). Appellant's firm also participated in eighty-eight different underwritings with New York financial houses (R. 56, 65, 67) and maintained a bank balance in New York (R. 58, 59).

Summary of Argument.

I. Appellant so employed his membership in the New York Stock Exchange that it acquired a business situs in the State of New York and the profit derived by appellant from the sale of a fractional membership constituted taxable income in New York.

(a) The general character of the property.

(b) Appellant's membership is property with a business situs in New York.

(c) Appellant's membership being property with a business situs in this State, the profit derived from the sale of a fractional membership was properly subjected to the New York Personal Income Tax.

ARGUMENT.

I.

Appellant so employed his membership in the New York Stock Exchange that it acquired a business situs in the State of New York and the profit derived by appellant from the sale of a fractional membership constituted taxable income in New York.

(a)

The general character of the property.

That a membership in the New York Stock Exchange is property seems to be well settled in law; it is, however, a species of property difficult of exact definition. While it partakes generally of the nature of an intangible, it has some peculiarities. It is very definitely and inextricably linked to the tangible real property of the New York Stock Exchange, which real property is located in New York State. Regarded from the standpoint of substance alone, and unaffected by the form of the ownership, this unincorporated association, of which appellant is a member, owns the fee of this real property, which is held primarily to facilitate the carrying on of the affairs of the Exchange and not as a means of profit. Hence, membership embodies an equity in tangible property located here. In addition, membership vests the holder with a definite, very valuable and exclusive privilege—that of conducting a business in the buying and selling of stocks and bonds upon the greatest market place of its kind in the world —a business limited to the owner and his fellow mem-

bers of the Exchange. *Finally, it unquestionably represents the member's share or interest in a New York business—the business conducted by the Exchange of furnishing a market place for securities, with all the facilities essential thereto.*

It is property of great value of which but a lesser proportion is what might be termed its book value, or the proportionate value of the assets of the Exchange itself if liquidated and distributed among the members. Its greatest value flows from the worth of the privilege that it confers upon its owner of trading, for himself or for others, upon the floor of the Exchange, in listed stocks and bonds. Hence, its value fluctuates with the volume of such trading, all of which is carried on within the State of New York.

Memberships in stock exchanges have been the subjects of litigation and adjudication in the Courts of this State. Thus, a membership has been held to be property which passes to a trustee in bankruptcy when the owner has been adjudged a bankrupt.

Platt v. Jones, 96 N. Y. 24.
O'Dell v. Boyden, 150 Fed. 731.

Such a membership has been held to be capital invested in business in this State.

People ex rel. Lemmon v. Feitner, 167 N. Y. 1.

A membership in the New York Stock Exchange has been held to be "property" within the meaning of former §242 (now §243) of the Tax Law and liable to the transfer tax.

Matter of Hellmann, 174 N. Y. 254.

A membership in the New York Stock Exchange, owned by a non-resident of this State, upon the death of such non-resident has been held subject to a transfer tax in this State.

Matter of Glendinning, 68 App. Div. 125; affirmed 171 N. Y. 684.

In the *Glendinning* case the Court, in discussing the decision in the Feitner case, said:

> "But an examination of the opinions delivered by the Court in that case shows that although such a seat on the New York Stock Exchange is not personal property under the restricted definition of the Tax Law (Laws of 1896, Chap. 908, §2, subd. 5, as am'd by Laws of 1901, Chap. 490) yet it is undoubtedly capital invested in business in this state which has a market value and can be bought and sold. If it is capital invested in business in this state, it is property, as it is difficult to see how capital invested in business, which has a market value and can be bought and sold does not fall within the term 'property'. The restrictions under which this property is held in no way affect its character."

(b)

Appellant's membership is property with a business situs in New York.

The maxim "*mobilia sequuntur personam*" is one that is frequently invoked when situs of an intangible is sought for the purposes of taxation, but the Courts have also recognized the existence of a "business situs" of an intangible—that is, the use of intangible property in connection with a business in a State other than that of the owner's domicile in such a manner that the property is held to have attained a business situs in such foreign jurisdiction so as to render it subject to taxation in that jurisdiction.

In Cooley on Taxation, Fourth Edition, Volume 2, §465, it is stated:

> "'Business situs' has come to be a well recognized term in the law of taxation. Primarily it is an exception to the rule that the situs of intangible personal property is at the domicile of the owner, so as to make property which has acquired a 'business situs' in a state other than the domicile of the owner, taxable in such state."

The rule of business situs has been applied to a branch brokerage business conducted through a local agent.

Berton, Griscom & Jenks v. City of New Orleans, 131 La. 73; 59 So. 19.

The existence of a business situs as applied to intangibles for taxation purposes has been recognized by this Court.

New Orleans v. Stempel, 175 U. S. 309;
Bristol v. Washington County, 177 U. S. 133;
Board of Assessors v. Comptoir National, 191 U. S. 388;
Metropolitan Life Insurance Co. v. New Orleans, 205 U. S. 395;
Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U. S. 346.

That this exception to the general rule of the situs of intangible personal property is still adhered to by this Court can best be established by quoting the words of Mr. Justice McReynolds in *Farmers Loan Co. v. Minnesota,* 280 U. S. 204, at page 213:

> "*New Orleans v. Stempel,* 175 U. S. 309, *Bristol v. Washington County,* 177 U. S. 133, *Liverpool & L. & G. Ins. Co. v. Orleans Assessors,* 221 U. S.

346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile."

See also, *Wheeling Steel Corp. v. Fox,* 298 U. S. 193.

In *Bristol v. Washington County,* 177 U. S. 133, *supra,* at page 141, this Court quoted with approval from the case of *In Re Jefferson,* 35 Minnesota 215, the following:

"For many purposes the domicile of the owner is deemed the situs of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual situs of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned,—at the domicile of the creditor. The creditor, however, may give it a business situs elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view of reloaning the money and keeping it invested as a permanent business."

And in *National Leather Co. v. Massachusetts,* 277 U. S. 413, plaintiff, a Maine corporation doing business in Massachusetts, owned all of the capital stock of two subsidiary Maine corporations which operated tanneries in Massachusetts. In the measure of a franchise tax assessed against plaintiff, there was included the value of the stocks of the foreign subsidiaries.

Concededly, the situs of these intangibles was at plaintiff's domicile but because plaintiff "through its ownership of the capital stock of the two subsidiary corporations and the control which it thereby exercised over them, did, in a very real and practical sense, employ these stocks as an instrumentality in carrying on its business within Massachusetts" (p. 423) this Court upheld the imposition of the tax, necessarily ascribing a business situs in Massachusetts to these intangibles.

The maxim *mobilia sequuntur personam* is but a legal fiction which must yield before the fact of the actual employment of an intangible in a State other than that of the owner's domicile. And what is the fact here, as against the operation of a legal fiction? The fact is that appellant has been able, through a New York agent, to conduct sizable and profitable transactions in securities in his Boston brokerage business because of his interest in a New York business—the business of the New York Stock Exchange. Those transactions were conducted through the medium of an agent in New York, but at all times appellant was fully possessed of the right to go upon the floor of the Exchange in New York and conduct the trading himself. Surely, if it were practicable for appellant to commute daily to New York, go upon the floor of the Exchange and personally execute his firm's purchases and sales, there could be no doubt that a business situs in New York would attach to his membership. Does it then, from the standpoint of substance, make any real difference that the transactions were consummated through an agent, rather than personally? We think not, and submit that the transaction of $150,000,000 worth of sales and purchases of securities in New

York, for the account of appellant's firm, made profitably possible only because of appellant's Stock Exchange membership, indelibly endowed that membership with a business situs in New York, whether appellant traded here personally or through a fellow-member, as his agent.

Appellant's argument that he was never in New York and did not personally make use of the rights and privileges attaching to his membership (P. 20 of Brief), is an implicit admission that, had he done so, the tax here involved would have been unobjectionable. But appellant testified (R. 63) that he always recognized the New York members who transacted his firm's business on the Exchange as "our agents for executing the orders". In such circumstances, we believe it is of no consequence whether appellant made personal use of the rights and privileges which his membership gave him or accomplished substantially the same result through an agent.

Appellant, together with his 1099 fellow members, *was* the New York Stock Exchange. Although set up in the form of an unincorporated association, the Exchange virtually amounts to a partnership. Its capital is supplied by its members or "partners." Thus, appellant was called upon to make a contribution in 1929 to the Exchange to augment or replenish its capital. Without any question, it is controlled and managed by officers chosen by the members or "partners". The fact that the Exchange itself does not function for profit cannot alter the conclusion that it conducts a business—the business of supplying what is undoubtedly the greatest marketplace of its kind in the world.

Because of the peculiar nature of its activities, no *direct* annual profits or earnings accrue to its members. Membership has, however, come to have great value, which fluctuates with the volume of business done upon the Exchange, for the reason that the greater the volume of dealings in securities done through the facilities of this New York business, the greater value the privilege of membership has. And it has greater value only because of the greater profits made possible through the exercise of the privilege conferred by membership.

Assuredly, the members must share the expenses and losses of the Exchange, as evidenced by appellant's contribution to the capital of the Exchange. While not formed primarily for profitable operation itself, any gains which might result would most surely accrue to the members of the Exchange.

Let us assume that the Exchange building should be sold at a great profit. Can there be any doubt that the gain would inure to the benefit of the members? Under the circumstances, we think that the New York Stock Exchange may be said for most purposes, including taxation, to constitute a partnership.'

Thus, in *Ludlum v. Wagner*, 212 App. Div. 779, the Court held that a voluntary association consisting of 145 persons, having a president, treasurer and trustees, was, in fact, a partnership.

The matter was dealt with in the Personal Income Tax Regulations (Manual 29) promulgated by the State Tax Commission. Thus, Article 228 read:

"Association distinguished from partnership. An organization, the partnership interests in which are not transferable without the consent of the members, is a partnership and not an association. Any so-called association or organization not taxable under article 9-a of the tax law and not exempted under such article, will be regarded as a partnership within the meaning of the income tax law. The members of such partnerships will be required to include in their returns their share of the profits of such partnerships, whether distributed or undistributed. Such partnerships will be required to file returns in the same manner as all other partnerships."

The New York Stock Exchange is not taxable under Article 9-a of the Tax Law (Corporation Franchise Tax), nor is it exempted under such article. It would seem to follow that, for the purposes of the personal income tax law, the Exchange constitutes a partnership; and, of course, if that be so, there can be no question that it is a New York partnership. This brings us to the inevitable conclusion that appellant herein, as a member of the Exchange, was a partner in a New York partnership, employing such partnership interest in connection with his Boston brokerage business.

The Exchange has further characteristics of a partnership. Thus, it exercises close supervision over the admission of new members. Appellant could only dispose of his membership, and of his fractional membership, through and with the approval of the Exchange. This illustrates the personal relationship between the members, comparable to that of a partnership.

In *Belton v. Hatch,* 109 N. Y. 593, the Court held that the New York Stock Exchange could not be said to be

strictly a copartnership for the sole reason, apparently, that the objects for which the Exchange was formed do not come within the definition of a partnership. Judge Gray said, however, page 596,

> "It may be said however, that the rights of the associates are not substantially different from those of partners, so far as their rights in the property of the association are concerned."

By virtue of his membership, appellant had the right to deal personally upon the floor of the Exchange or, if he preferred, through the agency of another member, at reduced commission rates. He chose to transact his business in the latter way and, in 1929, dealt in some 3,000,000 shares of stock, mostly for customers of his Boston brokerage firm.

It is unquestioned that the Exchange functions under the protection of the laws of this State. Similarly, the protection of the laws of this State extended to appellant's interest in this New York business. We submit that membership in the Exchange, when held by a non-resident and used for trading purposes here, either directly or in conjunction with another member as agent, is intangible personal property having a business situs in this State.

The situation here is akin to that in the case of *New Orleans v. Stempel*, 175 U. S. 309, *supra*, where the New York resident conducted through an agent in Louisiana, a business of loaning money on Louisiana real estate and the mortgages in possession of his agent there, were held to have a taxable situs in Louisiana. And to that in *Bristol v. Washington County*, 177 U. S. 133, *supra*, where a New York resident conducted a

loaning business in Minnesota, through the medium of a Minnesota agent, and the intangibles, the evidence of the debts, were considered to have attained a business situs for taxation in Minnesota. And to that in *Liverpool & L. & G. Ins. Co. v. Orleans Assessors*, 221 U. S. 346, *supra*, where the Court said, page 354:

> "The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the state, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power could be attributed to these credits, they could be localized there."

Here, through the medium of a New York agent, appellant participated in and made use of the privileges and facilities of a New York business—the New York Stock Exchange. If locality can be attributed to appellant's membership in the Exchange, assuredly it must be said to be localized in this State.

The essentially localized nature of the activities of the New York Stock Exchange has been emphasized by the Exchange itself. Early in 1934 the Congress, through a Committee, held hearings upon the Fletcher-Rayburn Stock Exchange Control bill, and in connection therewith there was filed on behalf of the New York Stock Exchange a brief questioning the constitutionality of the proposed legislation. The brief was submitted by Hunton, Williams, Anderson, Gay and Moore, Esqs., Electric Building, Richmond, Virginia, Counsel for New York Stock Exchange, Thomas B. Gay of Counsel.

The general tenor of the brief is to the effect that the activities and functions of the New York Stock Exchange are essentially localized in New York and are not so directly related to interstate commerce as to be fairly comprehended within the power of the Congress to regulate such commerce.

Bearing upon the localized nature of the activities and functions of the Stock Exchange and of its members, we quote from the Stock Exchange brief as follows:

"THE NATURE OF THE BUSINESS SOUGHT TO BE REGULATED.

"The business of a stock exchange is to centralize the purchase and sale of securities. Sales are made only between members of the exchange and, in the case of the New York Stock Exchange, the transactions occur only in its building in the city of New York.

"The purchases and sales made by members on the floor of the New York Stock Exchange are completed by actual delivery, either through the place for central delivery maintained by a subsidiary of the exchange or directly between the offices of the members which, under the rules of the exchange, must be located in its immediate vicinity. Therefore, the actual contracts of purchase and sale take place only in New York City, and all deliveries of securities and payment of money in connection with the performance of these contracts likewise occur solely in New York City.

"The immediate objects of sale are bonds or certificates of stock. In the case of bonds listed on the New York Stock Exchange, not only are the instruments themselves evidences of debt, but, under the rules of the exchange, the issuing corporations must maintain offices or paying agencies in the city of New York at which both principal and interest are payable.

"In the case of certificates of stock, they are constituents of title and, under the rules of the

> exchange, the issuing companies must maintain transfer agents and registrars in New York City where such certificates may be transferred of record." (New York Times, March 8, 1934.)

The case of *Citizens National Bank v. Durr*, 257 U. S. 99, involved the imposition of an Ohio property tax on a membership in the New York Stock Exchange owned by a resident of Ohio. This Court upheld the imposition of the tax but strongly intimated that such membership was also taxable in New York. At page 109, this Court said:

> "Nor is plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that state to tax them even as against a resident of Ohio."

Mr. Justices Holmes dissented, and wrote, page 110:

> "If left to myself I should have thought that the foundation and substance of the plaintiff's right was the right of himself and his associates personally to enter the New York Stock Exchange building and to do business there. I should have thought that all the rest was incidental to that and that that on its face was localized in New York. If so, it does not matter whether it is real or personal property or that it adds to the owner's credit and facilities in Ohio. The same would be true of a great estate in New York land."

(c)

Appellant's membership being property with a business situs in this State, the profit derived from the sale of a fractional membership was properly subjected to the New York Personal Income Tax.

Appellant suggests (p. 11 of Brief) an analogy between the ownership of an Exchange membership and

the ownership of stocks, bonds or other securities. Beyond the fact that each constitutes a species of intangible personal property, there is not the slightest similarity. The Exchange membership represents, primarily, an extremely valuable privilege exercisable, in the final analysis, only in New York. It has worth only as it may be employed in connection with other activities; by itself, it yields no interest or dividends and is severely restricted as to negotiability. We deem it unnecessary to discuss the characteristics of stock and bonds, or to enlarge further upon the fundamental differences between a Stock Exchange membership and a share of stock or a bond.

The fundamental, ultimate and indubitable justification of all taxation arises from the subjection of persons or property to the control of the sovereignty which seeks to impose the tax, and from the benefit to the person or property of the protection of that sovereignty and its laws.

First National Bank v. Maine, 284 U. S. 312, at page 334.

Certainly it cannot be questioned that the New York Stock Exchange itself functions under the laws and the protection of the sovereignty of the State of New York. Its property is in this State and the valuable rights and privileges which it confers upon its members must be exercised in this State. Members of the Exchange have time and again sought relief in the Courts of this State in settlement of controversies arising from the rights and obligations conferred by their membership in the Exchange.

A membership in a Stock Exchange has been held to be taxable both at the domicile of the owner and at the location of the Exchange.

Rogers v. Hennepin County, 240 U. S. 184.

That case involved the taxation of memberships in the Minneapolis Chamber of Commerce, as affecting members who were (1) residents of Minneapolis, (2) residents of Minnesota, outside of Minneapolis, and (3) residents of other States. With respect to all members residing outside of Minneapolis, it is stated (p. 186) that such members did not operate upon the exchange personally, except at rare intervals, and that their use of their memberships was practically limited to dealing through other members at reduced rates, exactly as in the instant case.

This Court held that the memberships of such non-residents, nevertheless, were taxable at the place where the exchange was located. Mr. Justice Hughes wrote, page 191:

> "There is the further contention with respect to the authority of the State to tax the memberships owned by citizens of other states. It is urged that the memberships are intangible rights held by the member at his domicile. *But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the Exchange in the City of Minneapolis, and we are of the opinion, applying a principle which has had recognition with respect to credits in favor of non-residents arising from business within the State,* and in the case of shares of stock of domestic corporations, that it was competent for the State to fix the situs of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located." (Emphasis ours.)

As authority, Mr. Justice Hughes cited *New Orleans v. Stempel,* 175 U. S. 309, 319, and *Liverpool Ins. Co. v. Orleans Assessors,* 221 U. S. 346, 354, 355; and, as we have noted earlier in our brief, these are the same cases cited with approval in *Farmers Loan Co. v. Minnesota, supra.*

Rogers v. Hennepin County affirmed a decision of the Minnesota Supreme Court,

Rogers v. Hennepin County, 124 Minnesota 539; 145 N. W. 112,

which case in turn was based on the decision in *State v. McPhail,* 124 Minnesota 398; 145 N. W. 108, in which latter case is found a detailed and exhaustive review of the decisions of various states applicable to the question.

A later case in Minnesota, involving the taxation of memberships in the Minneapolis Chamber of Commerce, was *State ex rel. Goetzman v. Lord,* 136 Minnesota 260; 161 N. W. 517, in which the Court reviewed the earlier decisions and said:

> "One of the relators is a resident of Minneapolis, another is a resident of the state outside of Minneapolis, and the other is a non-resident of the state. A question is made as to the proper place of taxation. The character of the rights and privileges which attend memberships is sufficiently stated in *State v. McPhail,* 124 Minnesota 398. * * * Such rights and privileges give whatever value there is in the memberships in excess of the value of the tangible property of the Chamber. They are exercisable only at Minneapolis. For the purpose of the taxation of such excess value the memberships, though owned without the state, or within the state, but without Minneapolis, have a situs here."

Rogers v. Hennepin County, 240 U. S. 184, *supra,* is controlling and conclusive as an authority for the proposition that the State of New York may fix the situs of a membership in the New York Stock Exchange as being in this State, for the purposes of taxation. The principle established in *Rogers v. Hennepin County* has not been modified by recent decisions of this Court dealing with the tax situs of intangibles.

Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83;

Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204;

Baldwin v. Missouri, 281 U. S. 506;

First National Bank v. Maine, 284 U. S. 312.

In the *Safe Deposit & Trust Co.* case, the Court specifically recognized the existence of a business situs as applied to intangibles and said, at page 93:

> "Intangible personal property may acquire a taxable situs where permanently located, employed and protected."

And in the *Farmers Loan Company* case, at page 213, the Court again recognized this principle and stated that the record in the instant case gave no occasion for the Court to inquire whether the securities could be taxed a second time at the owner's domicile. And in the same case, at page 215, Mr. Justice Stone, in a concurring opinion, said:

> "Hitherto the fact that taxation is 'double' has not been deemed to affect its constitutionality and there are, I think, too many situations in which a single economic interest may have such legal relationships with different taxing jurisdictions as to justify its taxation in both, to admit of our laying down any constitutional principle broadly prohib-

iting taxation merely because it is double, at least until that characterization is more precisely defined.

"It seems to me to be unnecessary and undesirable to lay down any doctrine whose extent and content are so dubious. Whether it is far reaching enough to overturn those cases which, in circumstances differing somewhat from the present, have been regarded as permitting taxation in more than one state, reaching the same economic interest, is so uncertain as to suggest doubts of its trustworthiness and utility as a principle of judicial decision."

It may be noted that appellant concedes (P. 15 of Brief) that no question of double or multiple taxation is here involved, the single issue being jurisdiction to tax.

In *Baldwin v. Missouri,* at page 590, the Court said:

"It does not appear and is not claimed that either the decedent or her son ever resided in Missouri. The record discloses nothing tending to show that the personal property had been given a business situs in that state."

The exception, and the reaffirmance of the existence of such a thing as a business situs applied to intangibles appear very clearly in the *First National Bank* case, at page 331. Mr. Justice Sutherland says:

"We do not overlook the possibility that shares of stock, *as well as other intangibles,* may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See *Farmers Loan Company* case, *supra,* at page 213. That question heretofore has been reserved and it still is reserved to be disposed of when, if ever, it properly be presented for our consideration." (Italics ours.)

In *Beidler v. South Carolina*, 282 U. S. 1, it was held that it was the Court's province to inquire whether there was evidence that the debts there in question had acquired a business situs, the State of South Carolina having sought to sustain the tax upon the ground that the business had attained a business situs in that State. This Court reversed the Court below upon the ground that the evidence was inadequate to afford a basis for a finding that the indebtedness had a business situs in South Carolina. But the entire tenor of the decision clearly indicates that this Court recognizes that an intangible may acquire such a situs for the purpose of taxation.

While the legal title to the real property of the Exchange in this State is in a corporation, certainly the equitable ownership is in the members; each member's interest is identical with that of every other member; each has the same capital interest and each is entitled to identical benefits.

We submit that a membership in the New York Stock Exchange, being property so intimately and closely entwined with tangible real property located in this State and carrying with it rights and privileges of great value exercisable in transactions conducted within this State, and representing, as we believe, for all practical intents and purposes, the interest of a partner in a New York business, must be considered to be property having a business situs in New York State and hence subject to taxation in the State of New York.

Appellant asserts (P. 17 of Brief) that the instant proceeding is in no wise controlled by the cases of

People ex rel. Blagden v. Lynch, 263 N. Y. 568; appeal dismissed and certiorari denied, 292 U. S. 602, and *People ex rel. Sackett v. Lynch*, 263 N. Y. 570; appeal dismissed 291 U. S. 652, because neither appellant nor his partners nor his firm ever had a place of abode or of business in this State. While these cases are distinguishable upon the ground that the taxpayers there had been engaged in the brokerage business in New York, the fact, nevertheless, remains that liability to an income tax was asserted upon both statutory grounds; namely, that the profit there arising from the sale of their memberships in the Exchange constituted income from a New York business and constituted income from property owned in this State. It will be recalled that in the *Blagden* case it was a conceded fact that the taxpayer retired from business in New York on or before December 31, 1927, and that he bought and sold no securities nor, in any other manner, used his Exchange membership for business purposes after that date. The sale of the membership took place in 1928.

No opinion was written by the State Courts to indicate whether judicial confirmation of the Tax Commission's determination rested upon either or both of these bases. That both grounds for imposing the tax were considered appears from the memorandum dissent of Judge Lehman in the *Blagden* case, wherein he expressed his belief that income from the sale of the Stock Exchange membership in question constituted "no profits of any business and the intangible personal property had no situs in New York *at the time of the assessment*, even assuming that the State of New York would have power to tax intangible personal property

which has a business situs within the State." (Italics ours.)

Appellant suggests (P. 28 of Brief) that there can be no basis for imputing a business situs in the instant case, for the reason that there was no business transacted here. We submit that the purchase and sale in 1929 of 3,000,000 shares of stock worth $150,000,000 transacted in New York by agents of appellant and his firm, by whom the trading was originated and to whom sixty per cent of the commission accrued, constituted a most substantial business transacted here; and where that business was made possible only because of appellant's membership in the New York Stock Exchange, then that membership has business situs in this State.

It is respectfully submitted that the final order and judgment of the Supreme Court of the State of New York should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 218.—October Term, 1936.

The People of the State of New York, *ex rel.* C. Handasyde Whitney, Appellant, *vs.* Mark Graves, John P. Hennessey and John J. Merrill, Tax Commissioners of the State of New York.	Appeal from the Supreme Court of the State of New York.

[January 4, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The question here presented relates to the constitutional validity of a tax imposed by the State of New York upon the profits realized by a non-resident upon the sale of a right appurtenant to membership in the New York Stock Exchange.

The relator, C. Handasyde Whitney, is a resident of the Commonwealth of Massachusetts and a member of a firm doing business in Boston. He and his copartners own a membership in the New York Stock Exchange. The membership stands in the relator's name. In 1929, by virtue of an increase in the number of members of the Exchange, each member became entitled to a "right" to one-fourth of a new membership. The relator sold that right for $108,000. The Tax Commission of New York, under sections 351 and 351-a of the Tax Law of that State, assessed a tax upon the profits derived from the sale, which were calculated at the difference between original cost, together with contributions paid in the form of dues, and the proceeds of the sale. The tax was paid under protest and the relator sought revision under the pertinent provision of the state law. The Tax Commission denied the application. The relator then obtained a writ of certiorari from the state court to review the commission's action and the commission made return embracing the record of its proceedings. In accordance with the state practice, the matter was heard by the Appellate Division of the Supreme Court which sustained the determination of the commission. 246 App. Div. 652. That ruling was affirmed

by the Court of Appeals, without opinion. Subsequently that court amended its remittitur by reciting that upon the appeal the relator contended that the assessment of the tax under the provisions of the state act "contravenes the Fourteenth Amendment of the Federal Constitution as an extraterritorial tax, and such question was presented and necessarily passed upon but not sustained by the court". 271 N. Y. 594, 618. The case comes here on appeal.

Aside from a brief statement of facts, the state courts have not aided us by a discussion or analysis of the nature of the right involved or the grounds for the assertion of the authority to lay the tax. From the record it appears that the New York Stock Exchange is an unincorporated voluntary association, limited as to membership and governed by its own constitution, by-laws and rules; that it holds the beneficial ownership of the entire capital stock of a New York corporation which owns the building in which the business of the Exchange is transacted, with the land upon which it stands, situated in the city of New York; that membership or seat in the Exchange carries with it valuable privileges and has a market value for the purpose of sale; that the Exchange is supported by dues and charges paid by its members and that contributions are also made to a "gratuity fund" which is in substance an insurance fund for the benefit of the widow and descendants of deceased members; that membership is evidenced by a certificate in the form of a letter signed by the secretary of the Exchange; that the membership can be transferred only through the Exchange and with its approval; that a member may personally buy or sell only in the Exchange building; that a member may buy or sell for the account of other members at a commission substantially less than that charged to a non-member; and that such rights and privileges are valuable and are exercisable only in transactions conducted at the Exchange building in the city of New York.[1]

The relator, in challenging the jurisdiction of the State of New York to lay the tax, stresses the points that the relator and his co-partners have always been domiciled in Massachusetts; that they have never had an office or abode in New York and have never carried on business there; that while they advertise themselves in

[1] See Belton *v.* Hatch, 109 N. Y. 593, 595, 596; People *ex rel.* Lemmon *v.* Feitner, 167 N. Y. 1, 4, 11, 13; Meyer, "The Law of Stock Brokers and Stock Exchanges," pp. 13-16, 75-79.

Boston as members of the New York Stock Exchange and accept orders from customers at their Boston office for execution on the New York Stock Exchange, none of that business is conducted by the relator or his copartners on the floor of that Exchange; that they do not buy and sell securities on the Exchange for their firm account; that orders requiring execution on the Exchange are telegraphed to members of the Exchange who have business offices in New York and who execute their orders on the Exchange in their own names, acting as correspondents, lending money on the security of the stock purchased and other collateral delivered to them. This business of relator's firm in 1929 involved approximately $150,000,000 worth of securities. And it appears that by reason of relator's membership in the Exchange, his firm was able to have their New York correspondents execute orders at forty per cent. of the commission fixed for non-members. Relator's firm charges its customers the fixed minimum commissions which they would have to pay any stock exchange house, and these commissions are divided with their New York correspondents by mutual agreement.

The relator's argument is that the membership in the Exchange is intangible personal property, that as a general rule property of that sort is taxable only at the domicile of the owner, and that unless the membership has a "business situs" in New York it is not taxable there. *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 213; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1, 8; *First National Bank* v. *Maine,* 284 U. S. 312, 329, 331; *Wheeling Steel Corporation* v. *Fox,* 298 U. S. 193, 209-211. He contends that the membership cannot be said to have a business situs in New York because he and his copartners reside and transact all their business in Massachusetts.

We think that the argument fails to give adequate consideration to the nature and incidents of the membership. When we speak of a "business situs" of intangible property in the taxing State we are indulging in a metaphor. We express the idea of localization by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place. The right may grow out of the actual transactions of a localized business or the right may be identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place. In the

latter case the localization for the purpose of transacting business may constitute a business situs quite as clearly as the conduct of the business itself.

Here, we are dealing with an intangible right of a peculiar nature. It embraces the privilege of a member to transact business on the Exchange as well as a valuable right of property which is the subject of transfer with the approval of the Exchange and may survive resignation, expulsion or death.[2] In both aspects the right is held and can be exercised only in subjection to the constitution, by-laws and rules of the Exchange. The Exchange is a market place. The privilege which inheres in the membership is the right to conduct transactions at that market place. That privilege of conducting the business of the buying and selling of securities on the floor of the Exchange is the dominant feature of the membership or "seat". Its very nature localizes it at the Exchange. It is a privilege which can be exercised nowhere else. The nature of that right is not altered by the failure to exercise it. Wherever the owner may reside he must go to the Exchange to exercise his privilege to trade upon its floor. If he prefers to have his customers' orders executed through other members, still they must execute these orders on the Exchange under its rules. Such orders are executed on his behalf, and by virtue of his membership and of the execution of his orders upon the Exchange he becomes entitled to the concession in commissions for which the rules provide.

Our decisions do not support the relator's contention. In *Rogers* v. *Hennepin County*, 240 U. S. 184, the question related to memberships in the Chamber of Commerce of the city of Minneapolis. It was urged on behalf of the citizens of other States that their memberships were intangible rights held at their domicile. But we decided that they were taxable in Minnesota. While it was said that the memberships represented rights and privileges which appeared to have been actually exercised at the Exchange in Minneapolis, the underlying consideration was the nature of the right and privilege which made those transactions possible. In *Citizens National Bank* v. *Durr*, 257 U. S. 99, a membership in the New York Stock Exchange, owned by a resident of Ohio, was held to be subject to taxation at his domicile. But the Court was care-

[2] Weston *v.* Ives, 97 N. Y. 232; Belton *v.* Hatch, 109 N. Y. 593; Matter of Grant, 132 App. Div. (N. Y.) 739, 742; Hyde *v.* Woods, 94 U. S. 523; Sparhawk *v.* Yerkes, 142 U. S. 1, 12; Meyer, *op. cit.*, pp. 115-117.

ful not to question the jurisdiction of the State of New York to tax "the membership privileges exercisable locally" in that State (*Id.*, pp. 109, 111) and what the Court said with respect to double taxation must be read in the light of the decisions in *Farmers Loan & Trust Co.* v. *Minnesota, supra,* and later cases upon that point. See *Wheeling Steel Corporation* v. *Fox, supra.*

We think that the dominant attribute of relator's membership in the New York Stock Exchange so links it to the situs of the Exchange as to localize it at that place and hence to bring it within the taxing power of New York. Accordingly we hold that in laying the tax upon the profits derived by the relator from the sale of the right appurtenant to his membership the State did not exceed the bounds of its jurisdiction. The judgment is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.